U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 15 2010

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research analyst for the Research and Evaluation Unit of the Missouri Department of Social Services (MDSS). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits arguments from counsel and additional exhibits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director found that the petitioner qualifies as a member of the professions holding an advanced degree. (We will revisit this finding later in this decision.) The sole stated basis for denial is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on December 23, 2008. The petitioner described his work and its importance:

> As a Research Analyst III, **I play a key role in the healthcare program administered by the Department**, with major responsibilities to conduct research, collect and manage

> data, analyze, and evaluate programs to ensure efficient use of Federal and State tax dollars spent on medical care for the needy.
>
> . . . In Missouri, spending public funds on health care is closely monitored. I play a key role in that monitoring process. The reports I produce from my econometric research and programming are used to eliminate fraud and ensure efficient planning and use of Federal and State health care funds. My work not only saves Federal taxpayers money, it also benefits the health care spending of Federal and State funds of the eight states that border Missouri. Therefore, **my work has a national impact**. . . .
>
> My contribution to the Division's provision of healthcare services encompasses four major efforts: elimination or reduction of false claims, elimination or reduction of electronic fraud, provision of data for proper budgeting and planning, and the design of survey instruments and sample determination to assess client satisfaction. . . .
>
> The combination of my extensive educational background in economics and my long practical work experience in applying the tools and processes of economics to real-life problems uniquely qualifies me to conduct the needed econometric research to ensure that Missouri will properly and efficiently manage its distribution of health care services to those in need. . . .
>
> I am petitioning for a National Interest Waiver for myself *solely* because my employer, **the Missouri Department of Social Services is prohibited for petitioning for permanent resident employees**. Therefore, neither the category of outstanding researcher nor the option of labor certification is available to me.

With regard to the petitioner's assertion that the MDSS cannot or will not seek a labor certification on his behalf, the criterion for the waiver is whether it would serve the national interest, not whether labor certification is unavailable. Nothing in the statute or regulations indicates that the waiver is automatically or preferentially available to an alien to whom labor certification is unavailable. Furthermore, if an employer's refusal to apply for labor certification were a valid basis for a waiver, then employers both public and private would have an incentive to adopt similar policies. Labor certification is part of the immigration system legislated by Congress, and employers cannot unilaterally declare themselves to be exempt from parts of that system.

Furthermore, the petitioner submitted nothing from the MDSS to support the claim that the MDSS is not allowed to file immigrant petitions or applications for labor certification. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

In a letter accompanying the initial submission, counsel stated:

> [The petitioner] has performed economic research and analysis and published his findings in Tanzania, the United States, and under the auspices of the Royal Tropical Institute of the Netherlands, and he has presented his research in France, Ethiopia, Kenya, The Netherlands, Nigeria, and Mali. . . . He has worked for the prospective employer, the Missouri Department of Social Services, for the last two years as a research economist on a combination of J-1 curricular and academic training. . . .
>
> The position [the petitioner] has occupied and to which he is applying to return is **Research Analyst III**, a "senior-level supervisory or specialized work [position] involving the research, analysis, evaluation, and reporting of statistical data." The responsibilities of the position . . . include, but are not limited to, the following: Analyze, evaluate, and produce statistical reports . . . using data from the Department of Social Services programs; prepare and modify computer programs used in the analysis, evaluation, and generation of reports; read, evaluate, and summarize legislative bills for the Unit Research Manager; review fiscal note worksheets for accuracy and prepare summaries for the Unit Research Manager . . . ; and carry out other duties as assigned by the supervisor including review of survey questionnaires and determination of sample size for divisions in the department.

The intrinsic merit of the petitioner's intended work is not in dispute. Counsel states that the petitioner's work is national in scope because:

> State health care funding relies upon and is inextricably intertwined with federal health care funding. . . . [The petitioner] has implemented and produced comprehensive and accurate statistical reports in Missouri based on valid testing models and compiled by computer programs he created particularly for each purpose. By comparing comprehensive data maintained on eligible health care recipients of Medicaid funding, he is able to test to determine if hospitals are over-charging the government for the services they provide. . . . Saving federal health care dollars in Missouri makes more healthcare funds available nationally to serve the interests of other regions of the country.

The petitioner did not demonstrate that his work has led, or is likely to lead, to reductions in federal funding allocations to Missouri and reallocation of those funds to other states. The petitioner's assertion that his work is national in scope because it affects "the eight states that border Missouri" is not persuasive because, apart from the lack of documentary support for that claim, work that affects nine out of 50 states is not national.

On January 9, 2009, the director issued a request for evidence (RFE), instructing the petitioner to establish the national (rather than local or regional) scope of his work. The director stated: "The evidence submitted suggests that the benefits of your employment accrue mainly to the State of Missouri."

In response to the RFE, counsel quoted from *Matter of New York State Dept. of Transportation*:

> Next, it must be shown that the proposed benefit will be national in scope. While the alien's employment may be limited to a particular geographic area, New York's bridges and roads connect the state to the national transportation system. The proper maintenance and operation of these bridges and roads therefore serve the interests of other regions of the country. Moreover, nothing in the record indicates that proper maintenance of New York's transportation infrastructure would have an adverse impact on the interests of other regions. We therefore conclude that the occupation in this case serves the national interest.

Id. at 217 (footnotes omitted). Counsel stated that the petitioner's "situation is exactly analogous: work for the State of Missouri on managing and safeguarding the allocation of resources within the national health care system, using taxpayers' funds gathered from all states of the United States is likewise national in scope and has a national impact."

The director denied the petition on May 20, 2009, in part because the petitioner's occupation lacks national scope. On appeal, counsel asserts that USCIS "totally ignored that its flagship case, *NYSDOT*, approved an exactly analogous type of work."

We do not share counsel's opinion regarding the closeness of the analogy. Not every worker involved in New York road and bridge maintenance can plausibly claim that his or her work has national scope. The alien in *Matter of New York State Dept. of Transportation* designed bridges, meaning that his work shaped the process considerably more than, for instance, the work of a mechanic who maintained and repaired paving equipment. In the present instance, the petitioner operates within a defined system without any discernible influence on the shape or structure of that system. The petitioner has not shown that his role at the MDSS is comparable to a direct, decision-making role in the transportation infrastructure.

Furthermore, if the involvement of "taxpayers' funds" were sufficient to grant national scope, then every taxpayer could claim national scope because those tax dollars could be disbursed over "all states of the United States."

We agree with the director that the petitioner has not established the national scope of his occupation. Even if we had reversed the director on this ground, the petition still could not be approved, for reasons explained below.

Having addressed the "intrinsic merit" and "national scope" prongs of the national interest test from *Matter of New York State Dept. of Transportation*, we turn now to the third prong of that test, concerning the particular contributions of the individual alien.

Counsel cited the petitioner's "25 years of education and experience in economics research," including "early publications in the 1990's." An exhibit list referred to the petitioner's "nineteen publications,"

but identified only five. Not all of these five items clearly qualify as "publications." One document is an MDSS Family Support Division monthly management report from November 2008. We cannot find the petitioner's name in the report, which consists almost entirely of statistical tables. The petitioner has not explained how this report would have been different if another analyst had compiled the statistics in the petitioner's place.

The monthly management report appears to be routine internal work product rather than a publication. The same appears to be true of "Kwimba District Informal Survey / Working Paper no. 9" from November 1994, which appears to be a photocopied manuscript rather than a published document.

Another document questionably identified as a "publication" is the beneficiary's doctoral dissertation. There is no evidence that the dissertation has been published. The petitioner has not explained how the subject of the dissertation, "Evaluation of Soy Hulls as the Principal Ingredient in a Beef Cattle Receiving Ration," relates to reducing Medicaid fraud.

The remaining two exhibits, more justifiably called "publications," consist of a the proceedings of a 1994 symposium on "Systems-Oriented Research in Agriculture and Rural Development" and a 1996 book chapter in *Focusing Livestock Systems Research.*

The agricultural theme of the petitioner's work prior to 2006 is consistent with his academic training, which consists of a bachelor's degree in agriculture, and two advanced degrees in agricultural economics. Rather than explain why the petitioner's agricultural training qualifies him for a national interest waiver to work in social services, counsel stated: "It makes no difference whether he is working in health care or in agriculture, he uses similar economic analysis principles to solve problems in either field."

The petitioner's initial submission included four witness letters. [redacted] of [redacted] stated:

> I assigned [the petitioner] to work on data related to the MO HealthNet Division (MHD), Missouri Medicaid Program. The mission of the MHD is to purchase and monitor health care services for low income and vulnerable citizens of the State of Missouri. The agency assures quality health care through development of service delivery systems, standards setting and enforcement, and education of providers and participants. The division is fiscally accountable for appropriate utilization of resources.
>
> The importance of [the petitioner's] work to the U.S. national interest can be summarized as follows: First, [the petitioner] produces statistical reports that are used by the MHD for planning and budgeting healthcare services in the state of Missouri. . . . The use of statistical data in planning and budgeting ensures proper utilization of resources of the state of Missouri and federal government. . . .

> Second, he participates in reviewing and summarizing legislative bills that have fiscal and policy implications to the MHD healthcare services . . . [which] enable[s] the legislators to formulate appropriate healthcare policies that are consistent with the budget constraints faced by both the state of Missouri and the federal government.
>
> Third, he contributes to reviewing survey instruments . . . for the MHD when seeking feedback from their clients. . . .
>
> Fourth, he produces reports that identify hospital patients receiving Medicare and Medicaid for hospitals that claim payment for the healthcare services they provide. . . . These reports ensure accountability on the use of state and federal government resources.
>
> In regard to the critical importance of the role he plays in the work of the unit, [the petitioner] prepares and maintains computer programs using the Statistical Analysis System (SAS) software for analysis, evaluation and production of monthly, quarterly, and annual reports.

[redacted] described the overall importance of the position, but did not explain why it is in the national interest to ensure that the petitioner, rather than a qualified United States worker, fills that position. The assertion that the petitioner is well-qualified for the job does not address that issue.

[redacted] was the petitioner's academic advisor at the University of Missouri-Columbia, where the petitioner earned his master's and doctoral degrees. [redacted] discussed the overall importance of the work done at the MDSS, and stated: "I believe [the petitioner's] educational background and work experience make him the right person to continue this work."

[redacted] at [redacted], stated: "We are the intermediary for Medicare Part A & B services in Arkansas. My connection with [the petitioner] is limited to verification of Missouri Medicaid eligible days for patients served in Arkansas hospitals, for inclusion in DSH (disproportionate share) reimbursement." [redacted] stated that "verification is important" owing to its "impact . . . [on] the Medicare program," and that the petitioner "has been responsive and timely to my requests for verification." Once again, this letter is little more than an acknowledgement that the petitioner is qualified and competent at a job that would be important no matter who held it.

[redacted] stated:

> The consulting firm that I work for has contracted with various hospitals to maximize their reimbursement within the regulations enacted by . . . the federal government. Our firm specializes in preparing the hospitals['] Medicate disproportionate Share Reimbursement calculation which relies entirely on the accuracy of the data that is provided by [the petitioner] within the Missouri Department of Social Services. [The petitioner's] in depth knowledge of the State of Missouri's eligibility systems enables

> him to provide accurate eligibility date related to the services that hospital[s] have provided to various patients. . . .
>
> My experience with [the petitioner] over the last two years has been positive as he is able to provide the information accurately and timely for both our clients, and the auditors for the federal government. At various times, prior to [the petitioner's] arrival at the Missouri Department of Social Services, this position has been vacant and the time response for the information has been much longer. His role is critical in providing accurate and timely information to us in order to pass this information to our clients and Medicare auditors.

[redacted] basically stated that the reimbursement process is faster when the petitioner's position is filled than when it is vacant. This does not force the conclusion that a national interest waiver is in order.

In the January 2009 RFE, the director stated that the national interest waiver was not "intended as a means for aliens to self-petition when their employers are unable to apply for a labor certification or file an immigrant petition on behalf of an alien." The director instructed the petitioner to submit evidence to show "a degree of influence on your field that distinguishes you from other economists with comparable academic/ professional qualifications."

In response, counsel claimed that the petitioner "distinguishes himself from 'the majority of his . . . colleagues' in that he has a long and internationally recognized multidisciplinary approach to solving practical economic problems." The petitioner has not shown that this background has had a significant effect on how he performs his current job, or that it has affected or influenced his counterparts in other states.

Counsel claimed that the petitioner "long ago established his reputation in the field of agricultural economics." The petitioner submitted copies of three published articles, two doctoral dissertations, and a "field technical report" containing citations to the petitioner's work in that field. It is not a minor or trivial observation that the petitioner is not working as an agricultural economist. The petitioner clearly possesses the fundamental statistical skills needed for his job at the MDSS, but we do not accept that the national interest requires that a research analyst who reconciles Medicaid claims should have an extensive background in African agriculture.

In denying the petition, the director found that the petitioner's evidence "does not provide insight into how the petitioner's work has influenced the greater field of economics." On appeal, counsel protests that the director's decision "grossly undercounts the number of [the petitioner's] research publications" and "fails to examine or discuss the *quality* of [the petitioner's] research" (emphasis in original). Counsel argues that the petitioner's "fifteen years of economic research work both in Tanzania and the United States and his solid academic record of accomplishment with two advanced degrees contribute with his publications and citation history to clearly constitute 'a past history of demonstrable achievement.'"

We must return once again to the obvious point that the bulk of the petitioner's experience and published work has no direct bearing on his work at the MDSS. On those occasions when counsel does not ignore this distinction entirely, counsel glosses it over by maintaining that there is only a superficial distinction between agriculture and Medicaid funding. This argument is not persuasive. The petitioner has submitted no evidence to show that his admittedly extensive background in agricultural economics has contributed to nationally significant progress or improvements in health care funding or fraud prevention. Whatever his influence in agricultural economics may or may not have been, the petitioner's demonstrated influence at the MDSS is limited to letters from colleagues who assert that the petitioner is qualified for his job.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

Review of the record reveals another issue that prevents the approval of the petition. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

In the denial notice, the director properly acknowledged that the petitioner holds advanced degrees, but erroneously found that "an advanced degree or exceptional ability is required by the occupation." The requirement thus cited is from 8 C.F.R. § 204.5(k)(4)(i), which only applies to petitions filed by intending employers with a qualifying job offer. In national interest waiver petitions, the only occupational requirement for an alien seeking classification as a member of the professions holding an advanced degree is that the occupation must qualify as a profession.

8 C.F.R. § 204.5(k)(2) defines a "profession" as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The petitioner's occupation is not listed in section 101(a)(32) of the Act. Therefore, the petitioner's occupation qualifies as a profession only if a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The petitioner submitted a printout from the Department of Labor's O*Net database, indicating that "[a] bachelor's degree is the minimum formal education required for" employment as an "economist." This

indicates that the occupation of an economist qualifies as a profession. This does not, however, establish that the MDSS seeks to employ the petitioner as an economist.

A copy of the job announcement for the petitioner's position reads, in part:

> EXPERIENCE AND EDUCATION QUALIFICATIONS: Two or more years of experience as a Research Analyst II with the Missouri Uniform Classification and Pay System.
>
> OR
>
> A Bachelor's degree from an accredited college or university with a minimum of 15 earned credit hours in one or a combination of the following: Public or Business Administration, Mathematics, Economics, Sociology, Education, Psychology, Computer Science, or a closely related field, including at least six earned credit hours in quantitative research methods or statistics; and,
>
> Three or more years of progressively responsible professional experience in the analysis and reporting of statistical data.
>
> (*Technical and professional experience in the field of statistical analysis and research may substitute on a year-for-year basis for the required education.*)
>
> (*Earned graduate credit hours from an accredited college or university in the specified areas including statistics or quantitative research methodology, may substitute on a year-for-year basis for the required experience at a rate of 24 earned graduate credit hours for one year of experience.*)

(Emphasis in original.) The job announcement mentions college coursework in several fields including economics, but there is no specific requirement that the candidate must have taken any courses in economics. The announcement never refers to the position as that of an economist.

Also, more importantly, the announcement indicates that experience can serve in lieu of a bachelor's degree. An individual with two or more years of experience as a research analyst II qualifies for the position without a degree, and other experience "may substitute on a year-for-year basis for the required education." Clearly, an individual holding a lower position can work his or her way up to the research analyst III position, and the petitioner has not established that the base position on this career ladder requires a bachelor's degree.

Because an individual can qualify for the position on the basis of experience alone, a bachelor's degree is not the minimum requirement for the position. Therefore, the petitioner's evidence does not show that the position meets the regulatory definition of a profession. The petitioner cannot get around this finding simply by declaring that a person in this position is an "economist" and therefore a professional. This finding amounts to an additional, independent basis for denial of the petition.

The AAO will dismiss the appeal for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.